87-355

Supreme Court, U.S.
FILED
AUG 28 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. .....

In The

Supreme Court of the United States

October Term, 1987

—o—

LOREN K. McMILLAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

—o—

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

—o—

SPRINGER AND STEINBERG, P.C.

JEFFREY A. SPRINGER
1600 Broadway, Suite 1500
Denver, Colorado 80202
(303) 861-2800

Counsel for Petitioner

August 1987.

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

I. Whether the Assimilative Crimes Act, 18 U.S.C. Section 13, may be used to incorporate state law into the Federal Manslaughter Statute, 18 U.S.C. Section 1112. Specifically, whether a violation of South Dakota law, by virtue of the Assimilative Crimes Act, can be used as the underlying "unlawful act not amounting to a felony" in a manslaughter prosecution arising from a death occurring on a federal enclave.

II. Whether giving a voluntary intoxication instruction in which the Court stated, in part, "there is evidence in this case tending to show that the Defendant may have been intoxicated . . . " in a prosecution where intoxication is both an element of the offense charged and is disputed and denied at trial deprives the Petitioner of his due process right to a fair trial.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES iv

THE PARTIES 1

OPINION BELOW 2

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS 2

STATEMENT OF THE CASE 5

REASONS FOR GRANTING THE WRIT 9

I. The Decision Of The Eighth Circuit Is Contrary Both To The Plain Wording Of The Assimilative Crimes Act, 18 U.S.C. Section 13, And The "Gross Negligence" Required By The Federal Manslaughter Statute In Circumstances Where A Defendant Is Charged With Killing A Human Being By An Unlawful Act Not Amounting To A Felony. In Addition, The Eighth Circuit's Opinion Creates A Split Among The Circuits Regarding Whether The Assimilative Crimes Act Can Be Used To Incorporate State Law As The "Unlawful Act Not Amounting To A Felony" Required By Title 18, Section 1112. Assuming, *Arguendo,* That State Law Can Be So Used, The Eighth Circuit's Opinion Creates A Conflict In The Circuits As To Whether The Assimilative Crimes Act May Be Used To Incorporate A State Offense Not Requiring A Culpable Mental State Consistent With The "Gross Negligence" Required By 18 U.S.C. Section 1112 9

II. The Giving Of An Instruction On "Voluntary Intoxication", Which Instruction Stated, In Part, "There Is Evidence In This Case Tending

TABLE OF CONTENTS—Continued

Page

To Show That The Defendant May Have Been Intoxicated . . . ", Was Unwarranted, Was Tantamount To Instructing The Jury That The Defendant Was Intoxicated At The Time Of The Crime, And Was Therefore So Substantially Prejudicial As To Deny The Defendant His Due Process Right To A Fair Trial Secured To Him By Amendment V Of The United States Constitution. 16

CONCLUSION 19

APPENDIX:

A ..... App. 1

B ..... App. 16

C ..... App. 17

D ..... App. 21

E ..... App. 22

F ..... App. 31

TABLE OF AUTHORITIES

Page

CONSTITUTION

U.S. Constitution, Amendment V 2, 16

STATUTES

18 U.S.C. Section 13 ..... 3, 9, 10, 11

18 U.S.C. Section 1112 ..... *passim*

18 U.S.C. Section 1152 ..... 3, 5, 9, 10

18 U.S.C. Section 1153 11

28 U.S.C. Section 1254 2

Supreme Court Rule 20, 28 U.S.C. 2

S.D.C.L. 32-23-1 4

S.D.C.L. 32-25-11.2 4

S.D.C.L. 32-29-2.1 5

CASES

United States v. Benally, 756 F.2d 773 (10th Cir. 1985) 11, 12, 13, 14, 15

United States v. Best, 573 F.2d 1095 (9th Cir. 1978) 11

United States v. Big Crow, 523 F.2d 955 (8th Cir. 1975), cert. denied 424 U.S. 920 (1976) 11

United States v. Brown, 608 F.2d 551 (5th Cir. 1979) 11

United States v. Butler, 541 F.2d 730 (8th Cir. 1976) 11, 12

United States v. Hanson, 618 F.2d 1261 (8th Cir. 1980) 18

TABLE OF AUTHORITIES—Continued

Page

United States v. Johnston, 543 F.2d 55 (8th Cir. 1976) 18

United States v. Lavallie, 666 F.2d 1217 (8th Cir. 1981) 18

United States v. McMillan, No. 86-5221 (May 28, 1987) 10, 14, 17

United States v. Pardee, 368 F.2d 368 (4th Cir. 1966) 11

United States v. Sharpnack, 355 U.S. 286 (1958) 13

Williams v. United States, 327 U.S. 711 (1946) 10, 11

No. .....

—o—

In The

Supreme Court of the United States

October Term, 1987

—o—

LOREN K. McMILLAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

—o—

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

—o—

The Petitioner, Loren K. McMillan, prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit which became final on July 14, 1987.[1]

---

[1]The only parties to this proceeding are those named in the caption of the case.

OPINION BELOW

On May 28, 1987, the United States Court of Appeals for the Eighth Circuit filed its Opinion affirming the Petitioner's conviction. That Opinion is reproduced in this Petition as Appendix "A".

———o———

JURISDICTION

The Opinion and Judgment of the United States Court of Appeals for the Eighth Circuit was filed on May 28, 1987. A Petition for Rehearing timely filed on behalf of the Petitioner was denied on July 14, 1987. The Order denying the Petiton for Rehearing appears as Appendix "B" of this Petition. This Petition for Writ of Certiorari is timely filed within sixty days from the date of the denial of the Petition for Rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 and Supreme Court Rule 20, 28 U.S.C.

———o———

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V, United States Constitution, provides as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be com-

pelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section 13, Title 18, U.S.C., provides as follows:

> Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in section 7 of this title, is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.

Section 1112, Title 18, U.S.C., provides as follows:

> (a) Manslaughter is the unlawful killing of a human being without malice. It is of two kinds:
>
> Voluntary—Upon a sudden quarrel or heat of passion.
>
> Involuntary—In the commission of an unlawful act not amounting to a felony, or in the commission in an unlawful manner, or without due caution and circumspection, of a lawful act which might produce death.
>
> (b) Within the special maritime and territorial jurisdiction of the United States,
>
> Whoever is guilty of voluntary manslaughter, shall be imprisoned not more than ten years;
>
> Whoever is guilty of involuntary manslaughter, shall be fined not more than $1,000 or imprisoned not more than three years, or both.

Section 1152, Title 18, U.S.C., provides as follows:

> Except as otherwise expressly provided by law, the general laws of the United States as to the punish-

ment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.

This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.

Section 32-23-1, South Dakota Codified Laws, provides as follows:

Driving or control of vehicle prohibited with alcohol in blood or while under influence of alcohol or drug. A person may not drive or be in actual physical control of any vehicle while:

(1) There is 0.10 percent or more by weight of alcohol in his blood as shown by chemical analysis of his breath, blood or other bodily substance;

(2) Under the influence of an alcoholic beverage;

(3) Under the influence of marijuana or any controlled drug or substance to a degree which renders him incapable of safely driving; or

(4) Under the combined influence of an alcoholic beverage and marijuana or any controlled drug or substance to a degree which renders him incapable of safely driving.

Section 32-25-11.2, South Dakota Codified Laws, provides as follows:

Maximum speed limit during emergency period. There is hereby established on all highways of this state a maximum speed limit of fifty-five miles per hour during the above period of emergency energy conservation.

Section 32-29-2.1, South Dakota Codified Laws, provides as follows:

> Action required at stop sign—Place of stopping. Except when directed to proceed by a police officer or traffic control signal, every driver of a vehicle approaching a stop intersection indicated by a stop sign shall come to a full stop at a clearly marked stop line, but if none, before entering the crosswalk on the near side of the intersection, or if none, then at the point nearest the intersecting roadway where the driver has a view of approaching traffic on the intersecting roadway before entering the intersection. After having stopped, the driver shall yield the right-of-way to any vehicle which has entered or is approaching the intersection from another highway and shall not proceed into the intersection until certain that such intersecting roadway is free from oncoming traffic which may affect safe passage.

———o———

STATEMENT OF THE CASE

On February 13, 1986, a federal Grand Jury in the District of South Dakota returned a one count indictment against the Petitioner, Loren K. McMillan (hereinafter "Petitioner", "McMillan" or "Defendant"), charging McMillan with involuntary manslaughter in violation of 18 U.S.C. Sections 1152 and 1112. The Indictment specifically charged that in the District of South Dakota, the Petitioner ". . . unlawfully killed a human being, Faith Ghost Bear, an Indian, without malice, in the commission of an unlawful act not amounting to a felony and without due caution or circumspection . . ." A copy of that Indictment appears in Appendix "F" of this Petition. Trial was to a jury and commenced on April 14, 1986.

Sometime between the hours of 8:00 p.m. and 9:00 p.m. on March 9, 1985, a 1970 Ford Maverick stalled at the intersection of Highway 18 and Kyle Road on the Pine Ridge Indian Reservation in South Dakota. The intersection of the roads forms a "Y" intersection. The Maverick stalled on Kyle Road facing U.S. Highway 18 in a position where it was not in the lane of travel for vehicles traveling eastbound on Kyle Road. The Maverick was protected by the peninsula formed by the intersection of the two roads. The stop sign for persons traveling eastbound on Kyle Road is placed well behind the point at which the Kyle Road actually intersects with U.S. Highway 18.

Repeated attempts to start the Maverick failed. Eventually, the battery ran down. In order to obtain another battery, two of the occupants walked approximately one-quarter mile to Batesland, South Dakota. They returned to the scene in a 1966 Oldsmobile in which the victim, Faith Ghost Bear, and others were passengers.

After several attempts to start the Maverick, the replacement battey ran down. Some of the occupants of the vehicles left the scene in the Oldsmobile to obtain "fresh" gasoline. Upon their return, the Maverick was pushed into the lane of travel for cars which were eastbound on Kyle Road. The Maverick was located between the stop sign and the point at which Kyle Road intersects with U.S. Highway 18. The Maverick and the Oldsmobile were parked facing each other. Witness accounts varied as to whether the vehicles' lights were on. McMillan testified he did not see any headlights or tailights.

At approximately 10:00 p.m., Loren McMillan, driving a pick-up truck, approached the intersection eastbound on

Kyle Road. According to McMillan, he suddenly saw the vehicles in front of him and attempted to turn to the left in order to avoid the vehicles. When he did so, he passed through the stop sign and collided first with the left front fender of the Maverick and then the right front of the Oldsmobile. The victim, Faith Ghost Bear, who was inside the Oldsmobile at the time of the accident, died as a result of the injuries sustained in the accident.

When Tribal Police arrived at the scene, McMillan appeared to be injured, was unsteady on his feet, and had an odor of alcohol about his person. One officer testified McMillan appeared to be in shock. After his arrest, McMillan was taken to the Sheriff's Department in Martin, South Dakota, where various field sobriety tests were administered and an intoxilyzer breath test performed. The intoxilyzer test result indicated a .17 blood alcohol content. Evidence at trial demonstrated that numerous state standards concerning the administration of an intoxilyzer test and maintenance of the intoxilyzer machine had not been adhered to by the intoxilyzer operator. McMillan himself testified he had consumed three alcoholic beverages between the hours of 6:00 p.m. and 8:00 p.m. on the night of the accident. Petitioner further testified that he had consumed no other alcoholic beverages on the day of the accident and that he at no time felt any affects of the alcoholic beverages which he had consumed.

At the conclusion of the evidence, over Defendant's objection, the District Court instructed the jury that voluntary intoxication was not a defense to the crime alleged in the Indictment. The Trial Court instructed the jury that "there is evidence in this case tending to show the Defendant may have been intoxicated prior to and at the time of the alleged commission of the offense with which he is charged". A copy of the pertinent excerpts regarding the Defendant's objection to the instruction and the Court's ruling is contained in Appendix "C". A copy of the voluntary intoxication instruction submitted to the jury is contained in this Petition as Appendix "D". The Court also instructed the jury as to the elements of involuntary manslaughter and as to the elements of various South Dakota traffic offenses to be considered by the jury as potential "unlawful acts" under 18 U.S.C. Section 1112. Copies of these instructions are contained in Appendix "E" of this Petition. At the conclusion of their deliberations, the jury returned a verdict of guilty.

———o———

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE EIGHTH CIRCUIT IS CONTRARY BOTH TO THE PLAIN WORDING OF THE ASSIMILATIVE CRIMES ACT, 18 U.S.C. SECTION 13, AND THE "GROSS NEGLIGENCE" REQUIRED BY THE FEDERAL MANSLAUGHTER STATUTE IN CIRCUMSTANCES WHERE A DEFENDANT IS CHARGED WITH KILLING A HUMAN BEING BY AN UNLAWFUL ACT NOT AMOUNTING TO A FELONY. IN ADDITION, THE EIGHTH CIRCUIT'S OPINION CREATES A SPLIT AMONG THE CIRCUITS REGARDING WHETHER THE ASSIMILATIVE CRIMES ACT CAN BE USED TO INCORPORATE STATE LAW AS THE "UNLAWFUL ACT NOT AMOUNTING TO A FELONY" REQUIRED BY TITLE 18, SECTION 1112. ASSUMING, ARGUENDO, THAT STATE LAW CAN BE SO USED, THE EIGHTH CIRCUIT'S OPINION CREATES A CONFLICT IN THE CIRCUITS AS TO WHETHER THE ASSIMILATIVE CRIMES ACT MAY BE USED TO INCORPORATE A STATE OFFENSE NOT REQUIRING A CULPABLE MENTAL STATE CONSISTENT WITH THE "GROSS NEGLIGENCE" REQUIRED BY 18 U.S.C. SECTION 1112.

In this action, the Defendant was indicted for involuntary manslaughter in violation of 18 U.S.C. Sections 1152 and 1112. The manslaughter statute, 18 U.S.C. Section 1112(a) provides in pertinent part as follows:

> (a) Manslaughter is the unlawful killing of a human being without malice. It is of two kinds:
>
> . . . Involuntary—In the commission of an unlawful act not amounting to a felony, or in the commission in an unlawful manner, or without due caution and circumspection, of a lawful act which might produce death . . .

The Indictment in this action charged that in the District of South Dakota, the Defendant, ". . . unlawfully killed a human being, Faith Ghost Bear, an Indian, without malice, in the commission of an unlawful act not amounting to a felony and without due caution or circumspection . . ." The language quoted as well as the proof at trial made clear the Defendant was charged with involuntary manslaughter only in the commission of an unlawful act not amounting to a felony. He was not charged under that portion of the statute which would permit a conviction for killing in the commission in an unlawful manner, or without due caution and circumspection, of a lawful act. The underlying unlawful acts not amounting to felonies alleged in this indictment were violations of various provisions of the South Dakota Codified Laws.

In affirming the Petitioner's conviction, the Eighth Circuit held that, because no enactments of Congress prohibit the conduct proscribed by the South Dakota statutes at issue here, those laws are assimilated into federal enclave law. The Court then stated "hence, the indictment which alleged that McMillan violated these South Dakota traffic laws properly alleged violations of 'unlawful acts' for the purposes of the involuntary manslaughter statute". *United States v. McMillan*, No. 86-5221 (May 28, 1987), Appendix A at App. 4. In so holding, the Eighth Circuit has contravened the legal principles announced in cases interpreting the Assimilative Crimes Act, including this Court's decision in *Williams v. United States*, 327 U.S. 711 (1946), and reached a result supported neither by case law nor principles of statutory construction.

The Assimilative Crimes Act, 18 U.S.C. Section 13, through 18 U.S.C. Section 1152, provides that whoever

commits an act on an Indian reservation "although not made punishable by any enactment of Congress" which would be punishable under state law, shall be guilty of a like offense. 18 U.S.C. Section 13; *United States v. Benally*, 756 F.2d 773 (10th Cir. 1985). The purpose of the Assimilative Crimes Act is to conform the criminal law of federal enclaves to that of local law except in cases of specific federal crimes. *United States v. Best*, 573 F.2d 1095 (9th Cir. 1978). Absent an express Congressional delegation of the authority to do so, state law may not be used to define federal crimes. *See, e.g.*, 18 U.S.C. Section 13; 18 U.S.C. Section 1153.

Under 18 U.S.C. Section 13, the Assimilative Crimes Act, the Government may resort to state law only if no act of Congress makes a defendant's conduct punishable. 18 U.S.C. Section 13; *Williams v. United States*, 327 U.S. 711 (1946); *United States v. Big Crow*, 523 F.2d 955 (8th Cir. 1975), cert. denied 424 U.S. 920 (1976); *United States v. Brown*, 608 F.2d 551 (5th Cir. 1979). The test for use of the Assimilative Crimes Act to incorporate state law is whether the acts of the Defendant are made punishable under any enactment of Congress. *United States v. Butler*, 541 F.2d 730 (8th Cir. 1976). If the acts of the defendant are made punishable under any enactment of Congress then the Assimilative Crimes Act cannot be used to incorporate state law to define any element of the federal offense. *See, United States v. Pardee*, 368 F.2d 368 (4th Cir. 1966); *United States v. Big Crow, supra; United States v. Benally*, 756 F.2d 773 (10th Cir. 1985). The fact that federal statutes may be narrower in scope than a state law prohibiting similar conduct does not allow the federal Government to use state law to broaden the defini-

tion of the federal offense. *United States v. Butler, supra.* Because the offense charged in this action, involuntary manslaughter, has been made punishable by an act of Congress, the Assimilative Crimes Act may not be used to incorporate state law in order to provide one of the essential elements of the offense. *See, United States v. Benally, supra* at 776.

Reduced to its essence, the holding of the Eighth Circuit is as follows: proof of a violation of South Dakota law is sufficient for the "underlying act not amounting to a felony" required under 18 U.S.C. Section 1112 as an essential element of the offense of involuntary manslaughter. This holding is contrary to the legal principles cited above. The Federal Government, through Congress, has proscribed the unlawful killing of human beings without malice through the manslaughter statute. 18 U.S.C. Section 1112. Because of the express language of the Assimilative Crimes Act, the Defendant could not have been prosecuted for a violation of South Dakota's involuntary manslaughter statute. Likewise, no other South Dakota state law may be incorporated, by way of the Assimilative Crimes Act, into the federal involuntary manslaughter statute in order to define the essential elements of the federal offense. In short, the same principles which prohibit use of South Dakota's involuntary manslaughter statute to define the essential elements of a federal offense prohibit the use of any other South Dakota statute to define the essential elements in a federal involuntary manslaughter prosecution.

The underlying rationale for the Assimilative Crimes Act is to apply the principle of conformity to state crim-

inal laws and punish minor offenses committed within federal enclaves. *United States v. Sharpnack*, 355 U.S. 286 (1958). In enacting the Assimilative Crimes Act, Congress has provided that within each federal enclave, *to the extent that offenses are not pre-empted by Congressional enactments*, there shall be complete conformity with the criminal laws of the respective states in which the enclaves are situated. *United States v. Sharpnack*, 355 U.S. at 293. (Emphasis supplied). Therefore, while states may legislate in such fashion as to make certain conduct criminal under federal law, if Congress has legislated states may not legislate in such fashion as to define elements of federal offenses created by Congress.

In addition to contravening legal principles applicable to interpretation of the Assimilative Crimes Act, the holding of the Eighth Circuit is directly and irreconcilably in conflict with the holding of the United States Court of Appeals for the Tenth Circuit in *United States v. Benally*, 756 F.2d 773 (10th Cir. 1985). In *Benally*, the Defendant was charged under 18 U.S.C. Section 1112 as a result of having been involved in a motor vehicle accident resulting in the death of a passenger. At trial, the prosecution introduced evidence of Benally's intoxication. At the close of evidence, and in accordance with a New Mexico state statute on driving under the influence of intoxicating liquor, the District Court instructed the jury as follows:

> A person is under the influence of intoxicating liquor when as a result of drinking such liquor he is less able, to the slightest degree, either mentally or physically, or both, to exercise the clear judgment and steady hand necessary to handle a vehicle with safety to himself and the public.

In addition, the Court properly instructed the jury on the gross negligence element of involuntary manslaughter. *United States v. Benally,* 756 F.2d at 776. The Tenth Circuit reversed because, despite the instruction on gross negligence, the New Mexico law of intoxication was inconsistent with federal law requiring a finding of gross negligence. In addition, the Court noted "it is enough to say that the Assimilative Crimes Act forbids the application of New Mexico instructions". *United States v. Benally,* 756 F.2d at 776.

In affirming the Petitioner's conviction, the Eighth Circuit attempted to distinguish the holding in *Benally* by noting the New Mexico intoxication instruction rejected by the Tenth Circuit in that case "was inconsistent with the federal involuntary manslaughter statute which requires a finding of gross negligence". *United States v. McMillan,* No. 86-5221 (May 28, 1987) Appendix A at App. 5. The Eighth Circuit then concluded the "*Benally* Court did not discuss at any point whether violations of state law may constitute unlawful acts for the purposes of the federal involuntary manslaughter statute". *United States v. McMillan,* No. 86-5221 (May 28, 1987) Appendix A at App. 5. The Eighth Circuit has clearly misperceived both the underlying principles of the Assimilative Crimes Act and the holding in *Benally.*

To the extent the Eighth Circuit sought to distinguish the holding in *Benally* on the grounds that the instruction in *Benally* "was inconsistent with the federal involuntary manslaughter statute which requires a finding of gross negligence", such a distinction cannot survive a comparison between the New Mexico and South Dakota laws of

intoxication. The applicable New Mexico instruction is set forth above. By comparison, the instruction given in McMillan's case concerning the law of intoxication in South Dakota is an even less stringent definition of intoxication, requiring only that the condition tend to deprive the Defendant "of that clearness of intellect and control of himself which he would otherwise possess". Unlike the New Mexico instruction, South Dakota law does not even require the Defendant's impairment deprive him of the ability "to handle a vehicle with safety to himself and the public". The instruction given in McMillan's case is no less "inconsistent" with the federal involuntary manslaughter statute than the instruction condemned in *Benally*.

In addition, the jury was also instructed as to South Dakota's offense of being in physical control of a vehicle while there is 0.10 percent or more by weight of alcohol in the blood. Appendix E, App. 25-27. The offense is a strict liability offense requiring no culpable mental state, i.e., the offense is complete when one is in physical control of a vehicle while there is 0.10 percent or more by weight of alcohol in one's blood. A strict liability offense cannot be committed in a grossly negligent fashion, and is therefore inconsistent with the gross negligence element required in a federal involuntary manslaughter prosecution.

Finally, the conviction in *Benally* was overturned not only because of conflict with the "gross negligence" requirement of the federal statute, but also because "the Assimilative Crimes Act forbids the application of New Mexico instructions". *United States v. Benally*, 765 F.2d at 776.

The Eighth Circuit cited no legal authority for its holding that the Assimilative Crimes Act could be used

to permit state law to define some of the essential elements of federal involuntary manslaughter. In addition, the Eighth Circuit's holding is contrary to both the express wording of the Assimilative Crimes Act and cases interpreting that act. Finally, the holding of the Eighth Circuit creates a direct and irreconcilable conflict between the United States Courts of Appeals for the Eighth and Tenth Circuits with regard to whether the Assimilative Crimes Act may be used to incorporate state law into the federal involuntary manslaughter statute. For those reasons, the Petitioner respectfully submits his Petition for Certiorari should be granted.

II. THE GIVING OF AN INSTRUCTION ON "VOLUNTARY INTOXICATION", WHICH INSTRUCTION STATED, IN PART, "THERE IS EVIDENCE IN THIS CASE TENDING TO SHOW THAT THE DEFENDANT MAY HAVE BEEN INTOXICATED . . .", WAS UNWARRANTED, WAS TANTAMOUNT TO INSTRUCTING THE JURY THAT THE DEFENDANT WAS INTOXICATED AT THE TIME OF THE CRIME, AND WAS THEREFORE SO SUBSTANTIALLY PREJUDICIAL AS TO DENY THE DEFENDANT HIS DUE PROCESS RIGHT TO A FAIR TRIAL SECURED TO HIM BY AMENDMENT V OF THE UNITED STATES CONSTITUTION.

At the close of evidence in the case, the District Court indicated its intention to give a "voluntary intoxication" instruction to the jury. Appendix C at App. 20. Because of the nature of the underlying offenses, and because a defense of voluntary intoxication was not, and could not have been, raised to a general intent crime such as involuntary manslaughter, the Defendant objected to the giving of such instruction. Appendix C at App. 19. The District

Court overruled the Petitioner's objection to the instruction and instructed the jury, in part, as follows:

> There is evidence in this case tending to show that the Defendant may have been intoxicated prior to and at the time of the alleged commission of the offense with which he is charged . . .

Appendix C at App. 20; Appendix D at App. 21.

In affirming McMillan's conviction, the Eighth Circuit held as follows:

> We do not find the voluntary intoxication instruction to be prejudicial in this case. There was a great deal of evidence presented at trial as to McMillan's intoxication at the time of the accident. The trial judge, in response to McMillan's objection at trial, stated that he was giving the instruction to make clear to the jury that voluntary intoxication was not a defense to the underlying offenses of speeding and failing to stop at the stop sign. Because the instruction was a correct statement of law, and because there was evidentiary support for it, we conclude the giving of the voluntary intoxication instruction was not prejudicial.

United States v. McMillan, No. 86-5221 (May 28, 1987) Appendix A at App. 15.

Given the fact that the issue of the Defendant's intoxication was contested at trial and the nature of the underlying offenses charged here, the Court's instruction that there was evidence tending to show the Defendant was intoxicated clearly violated McMillan's right to a fundamentally fair trial. Whether the evidence in this case showed the Defendant was intoxicated was a matter exclusively for the jury's resolution. The voluntary intoxication instruction given in this case was tantamount to instructing the jury that the Defendant was intoxicated at

the time of the crime. This instruction cannot conceivably comport with any notion of fundamental fairness.

Although intoxication can vitiate specific intent as an element of the crime charged, voluntary intoxication is not a defense to a crime of general intent. *United States v. Hanson*, 618 F.2d 1261 (8th Cir. 1980); *United States v. Johnston*, 543 F.2d 55 (8th Cir. 1976). In this case the "voluntary intoxication" defense was never raised by the Defendant. Because the crime charged in this Indictment and the underlying offenses are not crimes of specific intent such a defense would have been completely improper. Given the nature of the underlying unlawful acts in this action, the voluntary intoxication instruction so prejudiced the Defendant's case as to deny his right to a fair trial. *United States v. Lavallie*, 666 F.2d 1217 (8th Cir. 1981).

In this case, two of the underlying misdemeanors involved allegations that the Defendant drove a motor vehicle while intoxicated. To prevail, the government was required to prove the Defendant's intoxication beyond a reasonable doubt. The District Court's charge to the jury regarding voluntary intoxication effectively directed the jury to find the Defendant was intoxicated at the time of the offense with which he was charged. Given the nature of the underlying misdemeanors, this charge was highly prejudicial to the Defendant and violated his rights to due process of law.

The unmistakable thrust of the case against the Defendant was that he caused the death of Faith Ghost Bear as a result of driving while intoxicated. By its instruction, the District Court, in effect, advised the jury that the Court believed the Defendant was intoxicated at the time

of the acts charged in the Indictment and made the jury's finding of that fact a *fait accompli*. Such an instruction was unwarranted, irrelevant to any issue raised in the government's case in chief or in the defense, and denied the Defendant his right to a fair trial. Therefore, the Defendant's Petition should be granted.

———o———

CONCLUSION

For the reasons set forth above, Loren K. McMillan respectfully requests this Court grant his Petition for Certiorari in this matter.

Respectfully submitted,

SPRINGER AND STEINBERG, P.C.

JEFFREY A. SPRINGER
1600 Broadway, Suite 1500
Denver, Colorado 80202
(303) 861-2800

Counsel for Petitioner
Loren K. McMillan

APPENDIX "A"

UNITED STATES COURT OF APPEALS
For The Eighth Circuit

No. 86-5221

United States of America,	)	
	)	
Appellee,	)	Appeal from the
	)	United States District
v.	)	Court for the District
	)	of South Dakota.
Loren K. McMillan,	)	
	)	
Appellant.	)	

Submitted: December 8, 1986

Filed: May 28, 1987

Before ROSS, JOHN R. GIBSON, and FAGG, Circuit Judges.

ROSS, Circuit Judge.

Loren K. McMillan appeals his conviction of involuntary manslaughter in violation of 18 U.S.C. §§ 1152 and 1112 for which he was sentenced to thirty months imprisonment and a fine of $2000. For reversal, McMillan's primary arguments are that: 1) the indictment failed to allege a crime because it improperly incorporated South Dakota law into the federal manslaughter statute; 2) the district court[1] erred in refusing to grant McMillan's motion to sup-

[1]The Honorable Richard I. Battey, United States District Judge for the District of South Dakota.

press results of an intoxilyzer test; and 3) the district court erred in giving certain jury instructions. We affirm.

Facts

The charge against McMillan, a non-Indian, arose from a March 9, 1985 motor vehicle accident in which Faith Ghost Bear, an Indian, was killed. On that night, Ghost Bear and her husband had gone to the intersection of Highway 18 and Kyle Road on the Pine Ridge Indian Reservation to attempt to start a friend's car which had stalled. At the time of the accident, the Ghost Bear car and the other car were parked facing each other in the eastbound lane of Kyle Road, between a stop sign and the intersection of Kyle Road and Highway 18.

The facts of the accident are somewhat disputed. The government's evidence was that at about 10:00 p.m. McMillan's 1978 Chevrolet pickup ran the stop sign and collided with the two cars which were parked 60 feet beyond. A later examination of McMillan's speedometer showed that he was going about 70 m.p.h. at the time of impact. There was further testimony that all three vehicles had their lights on when the accident occurred.

McMillan, on the other hand, testified that he was travelling 40-45 m.p.h. as he approached the stop sign. He presented evidence that the lights of the parked vehicles were turned on just prior to impact.

McMillan testified that he had three drinks between 6:00 and 8:00 p.m. that night. He failed a portable breath test that was administered to him at the scene of the accident. He also failed field sobriety tests. An intoxilyzer breath test was performed on McMillan two hours after the accident and it showed his blood alcohol content to be .17.

Sufficiency of the Indictment

The federal involuntary manslaughter statute under which McMillan was indicted, 18 U.S.C. § 1112(a), provides that involuntary manslaughter is the "unlawful killing of a human being without malice * * * [i]n the commission of an unlawful act not amounting to a felony * * *." The indictment set forth four "unlawful acts" allegedly committed by McMillan which led to Ghost Bear's death. Specifically, the indictment charged that McMillan drove in excess of the speed limit in violation of S.D.C.L. 32-25-11.2, drove with alcohol in his blood and while under the influence of alcohol in violation of S.D.C.L. 32-23-1, and failed to stop at a stop intersection indicated by a stop sign in violation of S.D.C.L. 32-29-2.1.

McMillan argues that South Dakota law may not be incorporated by the federal manslaughter statute, and therefore the indictment failed to allege a crime. The gist of McMillan's argument is that under the Assimilative Crimes Act, 18 U.S.C. § 13,[2] the government may resort to state law only if no act of Congress makes the defendant's acts punishable. Therefore, he contends that because a federal statute makes unlawful the offense charged in the indictment, i.e., involuntary manslaughter, South Dakota law may not be used to define the underlying "unlawful act." We disagree.

---

[2]The Assimilative Crimes Act, 18 U.S.C. § 13, provides that a person who commits an act on a federal reservation:

> which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State * * * in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.

McMillan misperceives the application of the Assimilative Crimes Act to this case. This court has stated that the test of whether state law is applicable under the Assimilative Crimes Act is whether the acts of the defendant are punishable under any enactment of Congress. *United States v. Butler*, 541 F.2d 730, 737 (8th Cir. 1976). In this case, the government is not urging us to apply elements of the South Dakota law on involuntary manslaughter. In such a case, McMillan's argument may have merit.

Rather, in this case the state laws at issue are South Dakota traffic laws. It is undisputed that there are no enactments of Congress which prohibit driving while intoxicated, failing to stop at stop intersections or driving in excess of the speed limit on the Pine Ridge Reservation. Consequently, under the Assimilative Crimes Act the South Dakota traffic laws regarding these offenses are assimilated into federal enclave law. *See United States v. Pino*, 606 F.2d 908, 915 (10th Cir. 1979). Hence, the indictment which alleged that McMillan violated these South Dakota traffic laws properly alleged violations of "unlawful acts" for the purposes of the involuntary manslaughter statute. To hold in accordance with McMillan's argument would require us to determine that because the federal involuntary manslaughter statute is an enactment of Congress, violations of state law can never serve as the underlying unlawful act. We find such a result to be supported neither by caselaw nor the language of the manslaughter statute.

McMillan argues that this court should apply the holding of *United States v. Benally*, 756 F.2d 773 (10th Cir. 1985) to the case at hand. In *Benally*, the Tenth Circuit determined that the Assimilative Crimes Act prohibited application of New Mexico instructions regarding intoxica-

tion to a prosecution under the federal involuntary manslaughter statute. The court found that the New Mexico instruction, which provided that a person is under the influence of intoxicating liquor if his ability to handle a vehicle safely is affected to the slightest degree, was inconsistent with the federal involuntary manslaughter statute which requires a finding of gross negligence. *Id.* at 776.

We note that the issue in *Benally* was not the same as the issue faced by this court. The *Benally* court did not discuss at any point whether violations of state law may constitute unlawful acts for the purposes of the federal involuntary manslaughter statute. Therefore, we decline to apply *Benally* to this case.

Intoxilyzer

McMillan next argues that the trial court erred in denying his motion to suppress evidence of the results of the intoxilyzer test, contending that the test was not performed in conformity with South Dakota law and regulations. McMillan relies on S.D.C.L. § 32-23-14.1 (1984) which provides in part: "To be considered valid under the provisions of this chapter, the chemical test analysis of the person's breath shall have been performed according to methods approved by the state chemist and by an individual possessing a valid permit issued by the state chemist for this purpose." *See also State v. Richards*, 378 N.W.2d 259, 261 & n.1 (S.D. 1985) (discussing the "prima facie evidence" the state must produce before intoxilyzer results are admissible).

A representative of the South Dakota state chemist testified at the hearing on the motion to suppress and at trial that the methods approved by the state chemist include monthly calibration of the intoxilyzer, immediate repair in

the event of machine malfunction, and the presence of a witness to the administration of the intoxilyzer test. McMillan contends that the evidence showed that these procedures were not followed in this case. The district court denied McMillan's motion to suppress, stating that his objections went to the weight rather than the admissibility of the evidence.

The district court did not err in denying McMillan's motion to suppress. In a federal criminal proceeding, the admissibility of evidence is governed by federal standards. *See United States v. Collins,* 552 F.2d 243, 247 (8th Cir.), *cert. denied,* 434 U.S. 870 (1977); *United States v. Sacco,* 491 F.2d 995, 1003 (9th Cir. 1974). *See also United States v. Neville,* 516 F.2d 1302, 1309 (8th Cir.), *cert. denied,* 423 U.S. 925 (1975). We agree with the district court that McMillan's objections to the procedures employed in the administration of the intoxilyzer went to the weight of the evidence.

The representative of the state chemist testified that the type of intoxilyzer used in this case was an approved instrument for blood alcohol determinations, and that it operated in accordance with accepted scientific principles. As noted by McMillan, this witness also stated that the machine should be calibrated for accuracy approximately every thirty days. For the period surrounding the administration of the test to McMillan (on March 9, 1985), the intoxilyzer was calibrated on February 21, 1985 and April 7, 1985.

The state trooper who administered the intoxilyzer test to McMillan was certified by the state chemist to operate an intoxilyzer. He testified as to the procedures he fol-

lowed in administering the test to McMillan, which he performed in accordance with a checklist provided by the state. He stated that although there was no witness present during these procedures, the administration of the intoxilyzer test to McMillan was videotaped. This videotape was played for the jury.

McMillan had sufficient opportunity at trial to bring out any alleged deficiencies in the procedures followed in the performance of the test. The determination of the weight to be given the test results was for the jury.

Jury Instructions

A. Instruction 21

McMillan objects to the giving of several jury instructions. First, he objects to Instruction 21 which provided:

> You are instructed that if you find from the evidence that the Defendant was merely negligent in causing the victim's death through inadvertence, forgetfulness, lack of attention or thoughtlessness, then such conduct alone will not support a finding of the crime charged and you must find the Defendant not guilty. In order to find the Defendant guilty of the crime charged, you must find from the evidence that the Defendant caused the victim's death as a result of conduct that was unlawful *or* that exhibited a conscious indifference or reckless disregard for human life. (Emphasis added.)

The rule in this circuit is that a conviction of involuntary manslaughter requires a finding that the defendant

> "acted grossly negligently in that he acted with a wanton or reckless disregard for human life, knowing that his conduct was a threat to the lives of others or having knowledge of such circumstances as could reasonably have enabled him to foresee the peril to which his act might subject others."

United States v. Opsta, 659 F.2d 848, 849 (8th Cir. 1981) (quoting *United States v. Schmidt*, 626 F.2d 616, 617 (8th Cir.), *cert. denied*, 449 U.S. 904 (1980)). McMillan argues that Instruction 21 removed the elements of gross negligence and knowledge from the government's burden of proof such that the jury could have convicted him simply for committing an unlawful act.

It is well established that when a single jury instruction is alleged to be incorrect, it is not to be reviewed in isolation but rather in the context of the charge as a whole. *Cupp v. Naughten*, 414 U.S. 141, 146-47 (1973). Moreover, the charge is to be read in the context of the whole trial. *United States v. Park*, 421 U.S. 658, 674-75 (1975). We agree that if the last sentence of Instruction 21 were to be read in isolation, it would appear that part of the government's burden of proof had been removed. However, any error in that instruction was harmless in light of the instructions as a whole and in the context of the entire trial.

The jury was specifically charged in two other instructions that they must find the elements of gross negligence and knowledge beyond a reasonable doubt in order to convict McMillan. Instruction 7 charged the jury that there were "four essential elements" to the crime of involuntary manslaughter: 1) that McMillan caused Ghost Bear's death in the commission of one of the enumerated unlawful acts; 2) that he caused Ghost Bear's death within the territorial jurisdiction of the United States; 3) that in the commission of the unlawful act he acted in a grossly negligent manner; and 4) that he had knowledge that his conduct was a threat to the lives of others, or that such was reasonably foreseeable.

A second instruction, No. 8, provided that gross negligence was an element of the crime of involuntary manslaughter and that it must be proved beyond a reasonable doubt. This instruction also defined gross negligence.

Another instruction, No. 4, tracked the language of the indictment. It informed the jury that McMillan was charged with killing Ghost Bear while driving in a grossly negligent manner and in violation of several South Dakota statutes, and that he had knowledge that his conduct was a threat to the lives of others, or could have reasonably foreseen such.

Looking at Instruction 21 in the context of the instruction immediately previous to it is further evidence that the jury was properly charged. Instruction 20 provided in part "If you find that the government has proved beyond a reasonable doubt that the defendant committed one or more of the unlawful acts alleged in the indictment, then you should determine whether or not the government has proved the other essential elements of the crime charged." It was thereby made clear to the jury that more than simply the commission of an unlawful act was necessary for conviction.

It should fur'her be noted that the purpose of Instruction 21 was not to set out the elements of involuntary manslaughter. The elements of involuntary manslaughter were set out in Instruction 7. The purpose of Instruction 21, on the other hand, was to differentiate simple negligence from gross negligence. Therefore, it is not likely that the jury was confused or thought Instruction 21 contained all the elements of the offense charged.

Instruction 21 should also be considered in the context of the trial as a whole. Counsel for both parties stated in their opening statements to the jury that gross negligence was an element of the crime charged, and repeated such remarks in their closing statements. In addition, the government presented a great deal of evidence attempting to show the gross negligence of McMillan. For example, the government's expert testified that an examination of McMillan's speedometer after the accident indicated that he was travelling 70 m.p.h. at the time of impact. The accident occurred 60 feet past a stop sign which McMillan admitted he had failed to heed. Another expert testified that an examination of the light bulbs from all the vehicles involved in the accident indicated that all of the vehicles had their lights illuminated at the time of impact. Several police officers testified as to McMillan's state of intoxication. McMillan failed two sets of field sobriety tests and a preliminary breath test, and an intoxilyzer test performed two hours after the accident showed his blood alcohol content to be .17. The expert from the state chemist's office testified that assuming McMillan had nothing to drink in those two hours after the accident, his blood alcohol content at the time of the accident would have been .20. This same expert testified that any person, regardless of age, size, or history of drinking, who had a blood alcohol content of .17 would be under the influence. We therefore find that from the instructions as a whole in the context of the entire trial, the charge to the jury was proper.

McMillan also argues that reversal is required because Instruction 21 is inconsistent with Instruction 7, which properly set out the necessary elements of involuntary manslaughter. McMillan relies on *United States v.*

Varner, 748 F.2d 925, 927 (4th Cir. 1984) in which it was held that "[w]here two instructions are in conflict, and one is an incorrect statement of the law and is clearly prejudicial, the charge constitutes reversible error." We reject this argument because we do not find that Instruction 21 was "clearly prejudicial" in light of the instructions as a whole, nor was it likely to have created confusion in the jurors' minds.

B. Instructions 6 and 8

The involuntary manslaughter statute under which McMillan was indicted, 18 U.S.C. § 1112, provides that involuntary manslaughter may be committed in two ways, "[i]n the commission of an unlawful act not amounting to a felony, or in the commission in an unlawful manner, or without due caution and circumspection, of a lawful act which might produce death." The indictment in this case charged McMillan only with the first type of involuntary manslaughter, killing a human being in the commission of an unlawful act. However, Instructions 6 and 8 tracked the statutory language and provided that involuntary manslaughter was the killing of a human being either in the commission of an unlawful act *or* in the commission of a lawful act without due caution. McMillan argues that these two instructions impermissibly amended and broadened the indictment, mandating reversal.[3]

---

[3]McMillan also argues that Instruction 21 also constituted a material deviation from the indictment. Instruction 21 provided in part that in order to find McMillan guilty, the jury must find that he caused Ghost Bear's death "as a result of conduct that was unlawful *or* that exhibited a conscious indifference or reckless disregard for human life." (Emphasis added.) For the same reasons that we find that Instructions 6 and 8 were not prejudicial, we determine that this instruction was not prejudicial.

Again, these instructions must be considered in light of the charge as a whole. As previously noted, Instruction 4 repeated the language of the indictment, informing the jury that McMillan was charged only with that part of the involuntary manslaughter statute which pertained to the commission of an unlawful act. Instruction 7 provided that one of the necessary elements of the crime for which McMillan was charged was the commission of an unlawful act. Instruction 20 told the jury that "if you find that the government has failed to prove beyond a reasonable doubt that the defendant committed at least one of the unlawful acts charged in the indictment you must find the defendant not guilty of the crime of involuntary manslaughter." Eight other instructions were concerned with defining the underlying state traffic violations, or "unlawful acts," which McMillan allegedly committed.

Additionally, the government's case was based on the allegation that Ghost Bear's death occurred in the commission of an unlawful act, rather than in the commission of a lawful act without due caution. Further, the arguments of counsel for both parties at trial informed the jury that the commission of an underlying unlawful act was a necessary element of the offense. As a result, the jury was fully informed and instructed as to the portion of the involuntary manslaughter statute under which McMillan was charged.

C. S.D.C.L. § 32-23-1(1)

One of the four unlawful acts which the indictment alleged McMillan committed was violation of S.D.C.L. § 32-23-1(1), driving a motor vehicle while having a blood

alcohol content of .10 or more. McMillan contends that this offense should not have been included as an unlawful act because section 32-23-1(1) is a "strict liability" offense requiring no culpable mental state for violation, while a conviction under the federal involuntary manslaughter statute requires a finding of gross negligence. McMillan argues that because a person cannot commit a "strict liability" crime in a grossly negligent manner, the offense cannot serve as the underlying act for his conviction.

We are not persuaded by McMillan's argument. As noted, the indictment and the jury instructions, as well as the arguments of both counsel, made clear to the jury that in addition to finding that McMillan committed an unlawful act, a finding of gross negligence was necessary before a guilty verdict could be returned. The jury was not instructed that driving with a .10 blood alcohol content was in itself gross negligence. As we have already noted, there was a great deal of evidence presented at trial from which the jury could have made a finding of gross negligence.

D. Voluntary Intoxication

The district court gave the following instruction:

> There is evidence in this case tending to show that the Defendant may have been intoxicated prior to and at the time of the alleged commission of the offense with which he is charged. Intoxication may be used to rebut evidence of specific intent where the crime charged is one requiring a specific intent to commit the crime. In this case, however, the crime charged does not require specific intent. Therefore, no act committed by the Defendant while in a state of voluntary intoxication, if you so find, shall be deemed less

criminal by reason of his having been in such condition.

McMillan agrees that the instruction correctly states the law that involuntary manslaughter is a general rather than a specific intent crime and voluntary intoxication is not a defense to general intent crimes. *See United States v. Lavallie,* 666 F.2d 1217, 1219 (8th Cir. 1981); *United States v. Hanson,* 618 F.2d 1261, 1265 (8th Cir.), *cert. denied,* 449 U.S. 854 (1980). McMillan contends, however, that the instruction was improper because it gave the jury the impression that the trial judge thought that McMillan was intoxicated at the time of the incident. McMillan argues that this was unduly prejudicial in light of the fact that two of the underlying offenses on which the government had the burden of proof were intoxication offenses.

McMillan relies on *United States v. Lavallie, supra,* in which this court reversed a conviction on the grounds that a voluntary intoxication instruction denied the defendant the right to a fair trial. The offense in that case was also a general intent crime. As in the case at bar, Lavallie did not claim intoxication as a defense nor did he request the intoxication instruction. However, unlike this case, in *Lavallie* we determined that there was no evidence that Lavallie had been intoxicated at the time the offense occurred. Therefore, we held that "[w]ith neither evidentiary support nor relevance to the crime charged, the instruction may well have misled the jury by implying

that Lavellie was 'a drunken Indian.' " *Lavallie, supra,* at 1220.

We do not find the voluntary intoxication instruction to be prejudicial in this case. There was a great deal of evidence presented at trial as to McMillan's intoxication at the time of the accident. The trial judge, in response to McMillan's objection at trial, stated that he was giving the instruction to make clear to the jury that voluntary intoxication was not a defense to the underlying offenses of speeding and failing to stop at the stop sign. Because the instruction was a correct statement of the law, and because there was evidentiary support for it, we conclude that the giving of the voluntary intoxication instruction was not prejudicial.[5]

Conclusion

For the foregoing reasons, we affirm the conviction of Loren K. McMillan.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

---

[5]McMillan also raises other objections to the jury instructions, and makes an equal protection claim. After carefully considering the briefs and the record, we determine that these issues are without merit.

APPENDIX "B"

UNITED STATES COURT OF APPEALS
For The Eighth Circuit

No. 86-5221SD

United States of America,	)	
	)	
Appellee,	)	
	)	Appeal from the
vs.	)	United States District
	)	Court for the District
Loren K. McMillan,	)	of South Dakota.
	)	
Appellant.	)	

Appellant's petition for rehearing has been considered by the Court and is denied.

July 14, 1987

Order entered at the Direction of the Court:

Robert D. St. Vrain

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX "C"

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff,	CR86-50007-01 APRIL 17, 1986
vs.	
LOREN K. McMILLAN, Defendant.	RAPID CITY, SOUTH DAKOTA

VOLUME 4

TRANSCRIPT OF JURY TRIAL

BEFORE HONORABLE RICHARD H. BATTEY,
JUDGE
—AND A JURY—

A-P-P-E-A-R-A-N-C-E-S

FOR THE PLAINTIFF:

PHILIP N. HOGEN, ESQ.
UNITED STATES ATTORNEY
135 FEDERAL BUILDING
400 SOUTH PHILLIPS AVENUE
P.O. BOX 1073
SIOUX FALLS, SD 57101

FOR THE DEFENDANT:

TIMOTHY J. VANDER HEIDE, ESQ.
ATTORNEY AT LAW
34 NORTH 6TH STREET
P.O. BOX 552
CUSTER, SD 57730

COURT REPORTER:

T. DANIEL THOMPSON
314 UNITED STATES COURTHOUSE
RAPID CITY, SD 57701

The only phrase that the court took out of the statute was the phrase which says, quote "or is approaching". This is not an approaching case. And so that the court would deem that to be equitable.

With respect to 18 as altered, any objection to 18?

MR. VANDER HEIDE: No, Your Honor.

THE COURT: Any objection, counsel?

MR. HOGEN: No, Your Honor.

THE COURT: Very well. You may proceed.

MR. VANDER HEIDE: The defendant objects to instruction number 1 (sic) on the basis that the instruction implies again to the jury that with respect to unlawful acts it's not necessary for the jury to find gross negligence and actual knowledge.

THE COURT: Are you talking about number 1?

MR. VANDER HEIDE: I'm sorry. I am talking about 21.

THE COURT: 21 is your objection.

MR. VANDER HEIDE: I don't have any objection to instruction number 1 whatsoever.

THE COURT: Objection overruled.

MR. VANDER HEIDE: We object to instruction number 23, in that the defendant has not attempted to defend this case on the basis that he was intoxicated and in fact denied intoxication. We would object to that instruction on that basis.

THE COURT: That number is?

MR. VANDER HEIDE: 23. I am sorry, judge.

THE COURT: What's your argument on that one?

MR. VANDER HEIDE: We haven't interposed any defense or attempted to defend this case on the basis that the defendant is not guilty because he was intoxicated. And we don't feel that the instruction is appropriate.

We have not claimed that he was involuntarily intoxicated.

THE COURT: The court is of the opinion that there is sufficient evidence in the record that would permit an inference that intoxication may be such as to negate any affirmative duty required of the defendant as respects the operation of the motor vehicle, the adherence to the stop sign regulation and requirement and speeding, and that the only real purpose of the instruction is to indicate that there is no specific intent needed in this case.

The court will overrule that objection.

MR. VANDER HEIDE: We have no further objections to the instructions.

THE COURT: Very well. The instructions and the proposed verdict—are the proposed verdicts satisfactory?

MR. VANDER HEIDE: Yes, Your Honor. We have no objection to the proposed verdicts.

THE COURT: The instructions will be settled subject to all objections. The verdicts are approved and will be given.

APPENDIX "D"

INSTRUCTION NO. 23

There is evidence in this case tending to show that the Defendant may have been intoxicated prior to and at the time of the alleged commission of the offense with which he is charged. Intoxication may be used to rebut evidence of specific intent where the crime charged is one requiring a specific intent to commit the crime. In this case, however, the crime charged does not require specific intent. Therefore, no act committed by the Defendant while in a state of voluntary intoxication, if you so find, shall be deemed less criminal by reason of his having been in such condition.

APPENDIX "E"

INSTRUCTION NO. 4

The indictment in this case charges that the Defendant, on or about March 9, 1985, at the junction of U.S. Highway 18 and Kyle Road in Indian country, in the District of South Dakota, did kill a human being, Faith Ghost Bear, an Indian, without malice, in the commission of an unlawful act not amounting to a felony and without due caution or circumspection, to-wit: The Defendant did unlawfully kill Faith Ghost Bear by driving a 1978 Chevrolet pickup in a grossly negligent manner, by driving in excess of the speed limit in violation of SDCL 32-25-11.2, and with alcohol in his blood while under the influence of alcohol in violation of SDCL 32-23-1 and failing to stop at a stop intersection indicated by a stop sign in violation of SDCL 32-29-2.1; so that said vehicle struck the vehicle in which the said decedent, Faith Ghost Bear, was a passenger, knowing that his conduct was a threat to the lives of others or having knowledge of such circumstances as could reasonably have enabled him to foresee the peril to which his acts might subject others, and did thereby commit the crime of involuntary manslaughter, in violation of 18 U.S.C. §§ 1152 and 1112.

The Defendant has entered a plea of not guilty to the indictment, thus putting into issue each and every allegation of the indictment.

As I told you at the beginning of the trial, an indictment is simply an accusation. It is not evidence of anything. To the contrary, the defendant is presumed to be innocent. The law does not require a defendant to prove

his innocence or produce any evidence at all. Thus the defendant, even though accused, not only begins the trial with no evidence against him, but also with a presumption of innocence. That presumption of innocence can be overcome only if the government proves, beyond a reasonable doubt, each essential element of the crime charged.

INSTRUCTION NO. 6

Section 1112 of Title 18 of U.S.C. declares that, "Manslaughter is the unlawful killing of a human being without malice." One kind of manslaughter is involuntary manslaughter which is the unlawful killing of a human being without malice in the commission of an unlawful act not amounting to a felony, or in the commission in an unlawful manner, or without due caution and circumspection, of a lawful act which might produce death.

INSTRUCTION NO. 7

The crime of involuntary manslaughter as charged in the indictment has four essential elements, which are:

One, that on or about March 9, 1985, the Defendant, Loren K. McMillan, caused the death of Faith Ghost Bear in the commission of one or more of the following unlawful acts:

a. By driving a vehicle in excess of the speed limit; or

b. By operating a vehicle while there is 0.10 percent or more by weight of alcohol in his blood as shown by chemical analysis of his breath;

c. By driving a vehicle while under the influence of an alcoholic beverage;

d. By failing to stop at a stop intersection indicated by a stop sign; and

Two, that the Defendant caused the death of Faith Ghost Bear within the territorial jurisdiction of the United States, and

Three, that in the commission of the unlawful act, the Defendant, Loren K. McMillan, acted in a grossly negligent manner; and

Four, that the Defendant, Loren K. McMillan, had actual knowledge that his conduct was a threat to the lives of others, or had knowledge of such circumstances as would have made reasonably foreseeable to him the peril to which his acts might subject others.

To convict the Defendant of the crime charged, the Government must prove each of these essential elements beyond a reasonable doubt. If the Government has done so, you must find the Defendant guilty of the crime charged. On the other hand, if the Government has failed to prove each of these essential elements beyond a reasonable doubt, you must find the Defendant not guilty of the crime charged.

INSTRUCTION NO. 8

"Involuntary Manslaughter" is the unlawful killing of a human being without malice in the commission, in an unlawful manner, or without due caution and circumspection, of a lawful act which might produce death.

To do an act "without circumspection" means to act without attention to circumstances and without consideration of the possible consequences of one's actions.

To constitute the crime of involuntary manslaughter the act which causes death must amount to gross negligence, and gross negligence must be proved beyond a reasonable doubt.

Gross negligence is defined as a reckless disregard for human life. The defendant must be shown to have had actual knowledge that his conduct was a threat to the lives of others, or to have had knowledge that would reasonably enable him to foresee the peril to which his act might subject others. If the death in this case was merely accidental or the result of an honest error of judgment in performing a lawful act, the existence of gross negligence must not be found.

In determining whether or not the defendant is guilty of involuntary manslaughter, the jury must measure his conduct under all of the existing circumstances, and determine whether his conduct was in its nature so dangerous to life as to be grossly negligent.

INSTRUCTION NO. 12

You are instructed that under the law of the state of South Dakota a person may not drive a vehicle while:

1. there is 0.10 percent or more by weight of alcohol in his blood as shown by a chemical analysis of his breath; or
2. under the influence of an alcoholic beverage.

These set forth two separate and distinct means by which the act commonly referred to as "driving under the influence" may be committed. Should you find that the government has proved beyond a reasonable doubt either one of the violations of law as defined herein then you must find the Defendant committed the offense of driving a vehicle while under the influence of alcohol.

INSTRUCTION NO. 13

The unlawful act of driving a vehicle while there is 0.10 percent or more by weight of alcohol in his blood or while under the influence of an alcoholic beverage has two essential elements, which are:

1. That the Defendant at the time and place alleged in the incident drove a vehicle.
2. That the Defendant at the time and place had 0.10 percent or more by weight of alcohol in his blood or that the Defendant at the time and place was under the influence of an alcoholic beverage.

To find that the Defendant committed the unlawful act of driving a vehicle while there was 0.10 percent or more by weight of alcohol in his blood or while under the influence of an alcoholic beverage the Government must prove each of these essential elements beyond a reasonable doubt. If the Government has done so, you must find that the Defendant committed the unlawful act of driving a vehicle while there is 0.10 percent or more by weight of alcohol in his blood or while under the influence of an alcoholic beverage. On the other hand, if the Government has failed to prove each of these essential elements beyond a reasonable doubt,

you must find that the Defendant did not commit the unlawful act of driving while there was 0.10 percent or more by weight of alcohol in his blood or while under the influence of an alcoholic beverage.

INSTRUCTION NO. 14

The unlawful act of driving a vehicle while under the influence of an alcoholic beverage has two essential elements, which are:

1. That the Defendant at the time and place alleged in the indictment drove a vehicle; and
2. That the Defendant at the time and place charged was under the influence of an alcoholic beverage.

To find that the Defendant committed the unlawful act of driving a vehicle while under the influence of an alcoholic beverage, the Government must prove each of these essential elements beyond a reasonable doubt. If the Government has done so, you must find that the defendant committed the unlawful act of driving a vehicle while under the influence of an alcoholic beverage. On the other hand, if the Government has failed to prove each of these essential elements beyond a reasonable doubt, you must find that the Defendant did not commit the unlawful act of driving while under the influence of an alcoholic beverage.

INSTRUCTION NO. 15

You are instructed that under the charge of driving a vehicle while under the influence of an alcoholic beverage, it is not essential to the existence of the offense that the

driver of the vehicle should be so intoxicated that he cannot safely drive a vehicle. The expression "under the influence of an alcoholic beverage" covers not only all well known and easily recognized conditions and degrees of intoxication, but any abnormal mental or physical condition which is the result of indulging in any degree in an alcoholic beverage and which tends to deprive him of that clearness of intellect and control of himself which he would otherwise possess.

INSTRUCTION NO. 17

The unlawful act of driving a motor vehicle in excess of the lawful speed limit, as charged in the indictment, has one essential element which is that the Defendant exceeded the maximum speed limit of 55 miles an hour. To find that the Defendant committed the unlawful act of driving a motor vehicle in excess of the speed limit, the Government must prove this essential element beyond a reasonable doubt. If the Government has done so, you must find that the Defendant committed this unlawful act. On the other hand, if the Government has failed to prove this essential element beyond a reasonable doubt, you must find that the Defendant did not commit the unlawful act of driving a motor vehicle in excess of the speed limit.

INSTRUCTION NO. 18

You are instructed that under the law of the State of South Dakota every driver of a vehicle approaching a stop intersection indicated by a stop sign shall come to a com-

plete stop at the point nearest the intersecting roadway where the driver has a view of approaching traffic on the intersecting roadway before entering the intersection. After having stopped, the driver shall yield the right-of-way to any vehicle which has entered or is approaching the intersection from another highway and shall not proceed into the intersection until certain that such intersecting roadway is free from oncoming traffic which may affect safe passage.

INSTRUCTION NO. 19

The unlawful act of failing to stop at a stop intersection indicated by a stop sign, as charged in the indictment, has two essential elements, which are:

1. That the Defendant failed to come to a full stop at the point nearest to the intersecting roadway where the Defendant had a view of approaching traffic on the intersecting roadway before entering the intersection; and

2. That the Defendant failed to yield the right of way to a vehicle which had entered or was approaching the intersection from the other highway and proceeded into the intersection before he was certain that the intersecting roadway was free from oncoming traffic which could affect a safe passage.

To find that the Defendant committed the unlawful act of failing to stop at a stop intersection indicated by a stop sign, the Government must prove each of these elements beyond a reasonable doubt. If the Government has done so, you must find that the Defendant committed

the unlawful act of failing to stop at a stop intersection. On the other hand, if the Government has failed to prove each of these essential elements beyond a reasonable doubt, you must find that the Defendant did not commit the unlawful act of failing to stop at a stop intersection.

INSTRUCTION NO. 20

If you find that the government has proved beyond a reasonable doubt that the defendant committed one or more of the unlawful acts alleged in the indictment, then you should determine whether or not the government has proved the other essential elements of the crime charged. On the other hand, if you find that the government has failed to prove beyond a reasonable doubt that the defendant committed at least one of the unlawful acts charged in the indictment you must find the defendant not guilty of the crime of involuntary manslaughter.

APPENDIX "F"

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA,	CR 86-50007-01
Plaintiff,	INDICTMENT
vs.	(18 U.S.C. §§ 1152, 1112)
LOREN K. MCMILLAN,	Involuntary Manslaughter
Defendant.	(Filed February 13, 1986)

The Grand Jury charges:

On or about the 9th day of March, 1985, at the junction of U. S. Highway 18 and Kyle Road, in Indian Country, in the District of South Dakota, Loren K. McMillan, unlawfully killed a human being, Faith Ghost Bear, an Indian, without malice, in the commission of an unlawful act not amounting to a felony and without due caution or circumspection, to-wit: the defendant did unlawfully kill Faith Ghost Bear by driving a 1978 Chevrolet Pickup in a grossly negligent manner, by driving in excess of the speed limit in violation of SDCL 32-25-11.2, and with alcohol in his blood and while under the influence of alcohol in violation of SDCL 32-23-1 and failing to stop at a stop intersection indicated by a stop sign in violation of SDCL 32-29-2.1; so that said vehicle struck the vehicle in which the said decedent, Faith Ghost Bear, was a passenger, knowing that his conduct was a threat to the lives of others or having knowledge of such circumstances as could reasonably have enabled him to forsee the peril to which his acts might subject others, and did thereby commit the

crime of involuntary manslaughter, in violation of 18 U.S.C. §§ 1152 and 1112.

A TRUE BILL:
/s/ George Havel
FOREMAN

PHILIP N. HOGEN
United States Attorney

By: Bonnie P. Ulrich
ASSISTANT U.S. ATTORNEY